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No. 05-1294

In the Supreme Court of the United States

MCLANE WESTERN, INC.,

Petitioner,

v.

DEPARTMENT OF REVENUE; STATE OF COLORADO, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the Colorado District Court of Appeals, Division IV

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

CHARLES A. ROTHFELD
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

QUESTION PRESENTED

Whether a facially neutral state tax that is structured in such a way that it invariably imposes a greater burden on interstate businesses than on identical businesses that confine their operations to the taxing state violates the Commerce Clause of the U.S. Constitution.

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INTEREST OF THE *AMICI CURIAE*[1]

American Trucking Associations, Inc. (ATA) is a non-profit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. ATA is the national trade association of the trucking industry. It has more than 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before this and other courts.

Interstate commercial operations of the trucking industry are massive in size and scope. As of July 2004, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration had on file 524,309 registered interstate motor carriers. Almost eight billion tons of freight, with a value of $6.2 trillion, moved by truck in interstate commerce in 2002. U.S. Department of Transportation & U.S. Department of Commerce, *2002 Commodity Flow Survey*, at Table 1a. Millions of shipments per day are necessary to move that volume of freight and service the needs of the American economy.

ATA and its members have a critical interest in the protection of interstate commercial activity against all forms of

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court.

discriminatory state taxation and regulation. Discrimination that impedes the free flow of products in interstate commerce negatively affects the trucking industry in the same manner as does direct discrimination against interstate trucking itself. The interstate trucking industry historically has been one of the principal targets of discriminatory state taxation and regulation. As a result, ATA and its members have brought or participated in Commerce Clause challenges to a wide range of state taxes, fees, and regulations before this Court and other state and federal courts.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing a membership of more than three million businesses and organizations of every size, in every industry sector and geographical region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases in this Court addressing issues of vital concern to the Nation's business community, and has regularly participated in cases involving the meaning of the Commerce Clause.

The Chamber has a substantial interest in the issue presented in this case: businesses in all sectors of the economy have been affected by state taxes that discriminate against interstate commerce in their practical effects. Such discrimination, moreover, discourages the conduct of business across state lines and works a substantial drag on the national economy. The Chamber believes that the experience of its members with these problems makes it well situated to address the issues presented here.

STATEMENT

This case involves a challenge to a Colorado tax on activities related to the distribution of certain tobacco products in the State. Insofar as is relevant here, the tax is collected

from the person in the distribution chain who "first receives" the products in Colorado. Colo. Rev. Stat. §29-28.5-101, 102. During the time at issue in this case, the tax was imposed at a rate of twenty per cent on the price paid by the first Colorado distributor of the products.

Under this tax regime, the more that is done to the product (for example, marketing, sales, and distribution activity) outside Colorado, the higher the price of the product will be when it finally reaches and is "first receive[d]" by a distributor in the State – and the higher the tax due on the product will be. The court below recognized this, acknowledging that, "if the manufacturer and all the distributors were located within Colorado, the tax base would be at its lowest level." Pet. App. 6a. That is so because the tax is imposed only once per product, and when manufacturing and all distribution of the product takes place in Colorado, the tax is calculated at the time of first in-state distribution on the basis of a price that has not yet been inflated by the mark-ups related to transportation, marketing, and related activities that inevitably take place along the distribution chain. Thus, as petitioner explains (at Pet. 4), this tax structure means that the tax base is higher (and the amount collected correspondingly greater) when more of the products' distribution chain is located outside Colorado.

Petitioner brought this suit in Colorado state court, contending that the Colorado tax is unconstitutional under the Commerce Clause of the U.S. Constitution because it discriminates against interstate commerce in its practical effect. The trial court upheld the tax (Pet. App. 14a-25a) and the Colorado Court of Appeals affirmed. *Id.* at 1a-13a. The court of appeals recognized that, under the Colorado scheme, "the location of the manufacturers, suppliers, or distributors involved in the product's distribution network" has an impact on the size of the tax base and that, as a consequence, "the tax base will be higher the later in the distribution network the product is taxed." *Id.* at 6a. The court also acknowledged

that this regime "may place the product" that is distributed interstate "at a competitive disadvantage in the marketplace because the higher tax is added to the price." *Id.* at 8a. But the court nevertheless held the Colorado tax constitutional because it does not "tax[] out-of-state transactions or entities at a rate higher than it taxes in-state transactions, entities, or products, or * * * exemp[t] in-state transactions, entities, or products from an otherwise uniform tax." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

The Colorado tax imposes an obvious impediment to interstate commerce; the court below itself candidly acknowledged that the levy places products at a competitive disadvantage if more of their distribution chain is located out of state. This discriminatory impact on goods that are moved interstate should render the Colorado tax unconstitutional. In reaching the contrary conclusion, the court below was of the view that a tax's discrimination against interstate commerce in practical effect is immaterial so long as the levy does not *overtly* accord interstate commerce disparate treatment. But that conclusion, which invites states to develop subtle means of discrimination against interstate businesses, surely is wrong. Because the decision below illustrates a resistance to fundamental Commerce Clause principles that is found in many state tax regimes – and because it adopts an approach to the Clause that is inconsistent with the imperative for a uniform national economy that the Constitution was designed to foster – further review is warranted.

A. The Colorado Tax Imposes Discriminatory Burdens On Interstate Commerce

At the outset, there should be no doubt that the Colorado tax is inconsistent with the Commerce Clause. Petitioner demonstrates in detail that the tax should not survive application of the rule articulated in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963). See Pet. 10-13. Unsurprisingly, the tax also runs afoul of the broader principles that

animate this Court's Commerce Clause jurisprudence. The Court has understood the Clause to prevent states "from retreating into economic isolationism or jeopardizing the welfare of the Nation as a whole" (*Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175, 179-180 (1995)), either by directly discriminating against interstate commerce or by imposing taxes that more subtly "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266, 286-287 (1987) (quoting U.S. Const., Art. I, § 8, cl. 3). The Colorado tax does both.

The discriminatory impact of the tax is manifest. The amount of the levy turns on the price paid for the taxed product by the distributor who "first receives" the product in Colorado. As a consequence, it necessarily is the case that the amount of tax due will go up as more of the distribution chain is located outside Colorado, even if the products, packaging, marketing, and all other aspects of distribution are identical in every respect save location. There is no doubt about this effect of the tax. Indeed, the court below expressly acknowledged that "the location of the manufacturers, suppliers, or distributors involved in the product's distribution network and the price mark-up of each impacts the tax base or the price upon which the constant twenty percent tax rate is imposed" and "agree[d] with McLane's assertions that the tax base will be higher the later in the distribution network the product is taxed." Pet. App. 6a. The court accordingly agreed, as well, "that the tax base calculated on the price paid by the taxable distributor may place the product at a competitive disadvantage in the marketplace because the higher tax is added to the price." *Id.* at 8a. That effect casts grave doubt on the constitutionality of the tax: "Under [this Court's] consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other rea-

son than the location of its business is prohibited by the Commerce Clause." *Scheiner*, 483 U.S. at 286.

By the same token, taxes like Colorado's place "an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" The court below denied that effect, declaring that "the OTP tax scheme does not pressure out-of-state businesses to move to Colorado." Pet. App. 10a. But the court gave no explanation for its conclusion, which plainly is wrong. After all, when the distribution network is entirely in one state the tax is lower than when otherwise identical distribution activities cross state lines. See *id.* at 6a. Such a regime "place[s] interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines*, 514 U.S. at 185. Thus, "[a]s a practical matter, the statute encourages affected entities to limit their out-of-state" activities (*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997)), which necessarily encourages "tendencies toward economic Balkanization." *Jefferson Lines*, 514 U.S. at 180 (citations and internal quotation marks omitted).

B. A State Tax That Discriminates Against Interstate Commerce In Its Practical Effect Is Inconsistent With The Commerce Clause

In nevertheless upholding the Colorado tax, the court below construed this Court's Commerce Clause decisions to establish that "a tax is discriminatory if it taxes out-of-state transactions or entities at a rate higher than it taxes in-state transactions, entities, or products, or if it exempts in-state transactions, entities, or products from an otherwise uniform tax." The court accordingly found it dispositive that "[a]ll taxable distributors of OTP are taxed at the same rate and on a tax base determined in the same fashion." *Id.* at App. 8a. This focus on the superficial form of the tax – and the com-

plete disregard for the practical consequences of the tax's discriminatory effects – was a serious error.

Although the court below placed crucial weight on the fact that the Colorado tax does not facially discriminate against out-of-state entities in its rate or exemptions, this Court has emphasized that "the Commerce Clause has a deeper meaning that may be implicated even though state provisions, such as the one[] reviewed here, do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *Scheiner*, 483 U.S. at 281. In giving force to this "deeper meaning," the Court in its modern Commerce Clause decisions addressing state taxation has eschewed "a focus on * * * formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977). Instead, in its "more recent decisions" the Court has "'moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.'" *Scheiner*, 483 U.S. at 294-295 (quoting *Complete Auto Transit*, 430 U.S. at 281). See, *e.g.*, *Jefferson Lines*, 514 U.S. at 183; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981).

Starting from this perspective, the Court's "cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994). This means that "'[w]hat is ultimate is the principle that one state in its dealings with another may not put itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement.'" *Id.* at 202 (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

The Court has applied this principle repeatedly to invalidate state taxes that do not facially discriminate in their rates, exemptions, or tax bases, but that necessarily place interstate commerce at a competitive disadvantage. In *Nippert* v. *City*

of Richmond, 327 U.S. 416 (1946), for example, one of the seminal cases establishing the Court's modern Commerce Clause doctrine,[2] the Court struck down a flat municipal license fee imposed on solicitors (so-called "drummers") doing business in the city, explaining:

> [T]he tax * * * cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible.

Id. at 432.[3]

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[2] The Court's opinion in *Nippert* was authored by Justice Rutledge, whose views anticipated the Court's modern Commerce Clause doctrine in significant respects and were substantially incorporated in the *Complete Auto Transit* test. See *Complete Auto Transit*, 430 U.S. at 280-281, 282

[3] The Court placed particular emphasis on the practical consequences of the challenged tax: "[The] tax imposes substantial excluding and discriminatory effects of its own. * * * [T]he small operator and especially the casual or occasional one from out of the State will find the tax not only burdensome but prohibitive, with the result that the commerce is stopped before it is begun. And this effect will be extended to more substantial and regular operators, particularly those whose * * * market in any single locality * * * cannot be mined more than once every so often." Such a tax thus "can easily mean the stoppage of a large amount of commerce which would be carried on either in the absence of the tax or under the incidence of one taking account of those variations." *Id.* "Whether or not it was so intended, those are [the flat tax's] necessary effects." *Id.* at 434.

The Court applied this same principle to invalidate flat taxes on interstate motor carriers in *Scheiner*. Although the levies were "facially neutral" (483 U.S. at 269), the Court recognized that the challenged taxes necessarily disadvantaged interstate businesses: "[T]he very nature of the market that interstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. *Id.* at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego [*sic*] the privilege some of the time simply because of its interstate character, i.e., because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

Id. at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

Similarly, in *Baldwin* v. *G.A.F. Seelig*, *supra*, the Court held dispositive the practical effect of a facially neutral levy. There, New York established a uniform, minimum price for all milk, wherever produced. But "[t]his Court * * * did not hesitate to strike [the tax] down." *West Lynn Creamery*, 512 U.S. at 193. Writing for the Court, Justice Cardozo explained:

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.

294 U.S. at 527. As the Court subsequently described *Baldwin*, "because the minimum price regulation had the same

effect as a tariff or customs duty – neutralizing the advantage possessed by lower cost out-of-state producers – it was held unconstitutional." *West Lynn Creamery*, 512 U.S. at 194. See also, *e.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-353 (1977); *Dean Milk* v. *Madison*, 340 U.S. 349 354 (1951); *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940).

In all of these cases, the challenged taxes – like the Colorado levy – gave the appearance of equality. Like the Colorado tax, none of the challenged levies "tax[ed] out-of-state transactions or entities at a rate higher than it taxe[d] in-state transactions, entities, or products, or * * * exempt[ed] in-state transactions, entities, or products from an otherwise uniform tax." Pet. App. 7a. Yet this Court invalidated them all because they were structured so that their practical effects placed interstate commerce at a disadvantage as compared to otherwise identical commerce conducted exclusively in one state. Precisely the same conclusion is warranted here: as was true of the levy invalidated in *Nippert*, the Colorado tax "cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors."327 U.S. at 432.

C. The Court Should Grant Review To Clarify The Proper Treatment Of State Taxes That Discriminate Against Interstate Commerce In Their Practical Effect

The fundamental question presented here – how courts should approach state taxes that are facially neutral but discriminate against interstate commerce in their practical effect – is an important and recurring one that warrants this Court's review. It is an unfortunate reality that states have never stopped experimenting with taxes that place subtle but significant burdens on businesses that operate across state lines. Express discrimination is rare; "[i]n fact, tariffs against the products of other states are so patently unconstitutional that

[the Court's] cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means." *West Lynn Creamery*, 512 U.S. at 193.

There is no mystery about the reason for the perennial nature of such state enactments. The practical burden of truly evenhanded state taxes "'usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.'" *West Lynn Creamery*, 512 U.S. at 200 (quoting *Raymond Motor Tranport, Inc.* v. *Rice*, 434 U.S. 429, 444 n. 18 (1978)). But there is no in-state political constituency to curtail the enactment of tax regimes that disproportionately burden out-of-state taxpayers. To the contrary, every state has an understandable incentive to export as much of its tax burden as possible to foreign entities – a course that has the added benefit (from the enacting state's perspective) of providing a competitive advantage to businesses that concentrate their operations in the taxing state.

ATA's experience demonstrates this reality. Following this Court's landmark *Scheiner* decision in 1987, which held that flat state taxes on interstate motor carriers violate the Commerce Clause, ATA hoped that states would recognize the decision's unequivocal condemnation of flat, annual charges on interstate trucking operations and quickly eliminate them. Instead, most states tried to evade *Scheiner*'s principles and forced ATA to undertake an ongoing, decades-long litigation effort to enforce the Commerce Clause requirements that *Scheiner* articulated. See, *e.g.*, *Commonwealth Transportation Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W. 2d 65 (Ky. 1988); *Black Beauty Trucking, Inc.* v. *Indiana Dept. of Revenue*, 527 N.E. 2d 1163 (Ind. Tax Ct. 1988); *American Trucking Associations, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991); *American Trucking Associations, Inc.* v. *State*, 556 N.W. 2d 761 (Wis.

Ct. App. 1996), rev. denied, 560 N.W.2d 274 (Wis. 1996). All told, ATA has been forced to bring suit against 15 states challenging more than two dozen flat state taxes and fees imposed on interstate trucking.[4] Indeed, that effort continues to

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[4] *American Trucking Associations, Inc.* v. *State of New Jersey*, 852 A.2d 152 (N.J. 2004) (hazardous waste transporter fee (N.J. Stat. Ann. § 13:1E-18)); *American Trucking Associations, Inc.* v. *State*, 556 N.W. 2d 761 (Wis. Ct. App. 1996), rev. denied, 560 N.W.2d 274 (Wisc. 1996) ($400-per-company hazardous material transportation fee (Wis. Admin. Code § SERB 4.03(2)(a)-(e)); *American Trucking Associations, Inc.* v. *New Hampshire*, No. 89-E-00405-B (N.H. Super. Ct., Merrimack Co., 1995) ($200-per-unit hazardous waste transporter fee (N.H. Rev. Stat. Ann. § 147-A:6, II) and $25-per-unit hazardous material fee (reduced to $5-per-truck during the litigation) (N.H. Rev. Stat. Ann. § 21-P:20, IV)); *American Trucking Associations, Inc.* v. *Denn*, No. C2-95-4910 (Minn. Dist. Ct., Ramsey Cty., 1995) ($40-per-vehicle cab card fee (Minn. Stat. § 221.31)); *American Trucking Associations, Inc.* v. *Secretary of Admin.*, 613 N.E. 2d 95 (Mass. 1993) ($7-per-truck license fee and $7-per-truck "user of special fuels" license fee (Mass. Gen. Laws ch. 62C, § 67) and $200-per-truck hazardous waste carrier fee (Mass. Gen. Laws ch. 21C, § 7)); *American Trucking Associations, Inc.* v. *Smith*, No. 89-0385 (Ark. Chancery Ct., 1992) ($10-per-truck fuel decal tax (Ark. Code Ann. § 26-55-708 (2)); *American Trucking Associations, Inc.* v. *Cowan*, No.TX91-01608 (Ariz. Chancery Ct., 1992) ($125-per-truck cargo tank fee (Ariz. Rev. Stat. § 28-3005) and $100-per-carrier, $25-per-truck hazardous and special waste transporter fees (Ariz. Rev. Stat. §§ 28-2421 and 28-2422)); *Marx* v. *American Trucking Associations, Inc.*, 600 So. 2d 212 (Miss. 1992) ($12-per-truck fuel identification fee (Miss. Code Ann. § 27-61-5(1)) and $13-per-truck bingo stamp fee (Miss. Code Ann. § 77-7-119)); *American Trucking Associations, Inc.* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991) ($25-per-truck hazardous waste fee (Me. Rev. Stat. Ann. tit. 29 § 246-D)); *American Trucking Associations, Inc.* v. *New Hampshire*, No. 89-E-00405 (N.H. Super. Ct., Merrimack Co., 1991) ($20-per-truck decal fee (N.H. Rev. Stat. Ann. § 260:52, V (Supp. 1988))); *American Trucking Associations, Inc.* v. *Secretary of State*, No. CV-89-410 (Me.

this day: ATA's challenge to Oregon's flat motor carrier tax, which was successful in the Oregon Court of Appeals but rejected by the Oregon Supreme Court, is now pending in this Court. See No. 05-1177, *American Trucking Associations, Inc.* v. *State of Oregon* (cert. pending) (challenging *American Trucking Associations, Inc.* v. *State of Oregon*, 124 P. 3d 1210 (Or. 2005)).

Although interstate motor carriers have been a particular target of parochial state taxation, all businesses that operate across state lines are potential victims of taxes that have a discriminatory impact on interstate commerce. This Court's decisions, which over the years have resolved Commerce Clause challenges brought by taxpayers in virtually all industries and sectors of the economy, illustrate that point graphically. See, *e.g.*, *West Lynn Creamery*, 512 U.S. at 194 (citing cases). Yet, as the decision below shows, the lower courts continue to struggle with the principles that govern "practical effects" discrimination.

1990) ($15-per-truck decal fee (Me. Rev. Stat. Ann. tit. 29 § 246-A)); *American Trucking Associations, Inc.* v. *Conway*, 566 A.2d 1323 (Vt. 1989) ($50-per-truck fuel decal fee (Vt. Stat. Ann. tit. 23 § 415 (1982)) and $50-per-truck retaliatory fee (Vt. Stat. Ann. tit. 23 § 3007 (1982))); *American Trucking Associations, Inc.* v. *Goldstein*, 541 A.2d 955 (Md. 1988) ($25-per-truck fuel decal fee (Md. Ann. Code art. 81, § 423(a)(1987 Cum. Supp.)); *Commonwealth Transportation Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988) ($150-per-truck supplemental highway use tax (Ky. Rev. Stat. Ann. § 1388.660(4-7)); *American Trucking Associations, Inc.* v. *Gray*, 746 S.W.2d 377 (Ark. 1988) ($175-per-truck highway use equalization tax (Ark. Code. Ann. §§ 75-817 and 75-819)); *Black Beauty Trucking, Inc.* v. *Indiana Dept. of Revenue*, 527 N.E.2d 1163 (Ind.Tax Ct., 1988) ($50-per-truck supplemental highway use tax (Ind. Code § 6-6-8-1 et seq.)); *American Trucking Associations, Inc.* v. *Kline*, 9 N.J.Tax 631 (N.J., 1987) ($25-per-truck fuel decal fee (N.J. Stat. Ann. § 54:39A-10)).

This issue involves a matter of tremendous importance to the national economy. As the Court has observed repeatedly, the values embodied in the Commerce Clause "reflect a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Jefferson Lines*, 514 U.S. at 180 (citations and internal quotation marks omitted). See, *e.g.*, *Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994).

Thus, as ATA emphasizes in its own pending petition for certiorari in No. 05-1177, *American Trucking Associations, Inc.* v. *State of Oregon*, whether or not "the facts of this particular case, viewed in isolation, * * * appear to pose any threat to the health of the national economy," the aggregate effect of statutes like these cannot be gainsaid:

> [H]istory, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of [the Court's] Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that [Colorado's] statute represents would invite significant inroads on our "national solidarity."

Camps Newfound/Owatonna, 520 U.S. at 595 (quoting *Baldwin*, 294 U.S. at 523). In light of this important principle, the Court has acknowledged its "'duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against in-

terstate commerce.'" *West Lynn Creamery*, 512 U.S. at 201 (quoting *Best & Co.*, 311 U.S. at 455-456). Because the Colorado tax is structured to work such a practical discrimination, because discriminatory state taxes of this sort regularly pop up to bedevil taxpayers across the country, and because the proper treatment of such taxes continues to confuse state courts, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT DIGGES, JR.
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314
(703) 838-1865

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

CHARLES A. ROTHFELD
Counsel of Record
EVAN M. TAGER
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

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